No. 19-1015

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

JUMANA NAGARWALA, et al.,

Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan

OPPOSITION OF THE UNITED STATES TO MOTION OF THE U.S. HOUSE OF REPRESENTATIVES TO INTERVENE

BRIAN A. BENCZKOWSKI
Assistant Attorney General

MATTHEW S. MINER
Deputy Assistant Attorney General

SONJA M. RALSTON
Attorney
Criminal Division, Appellate Section
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Suite 1264
Washington, DC 20530
(202) 532-6047
Sonja.Ralston@usdoj.gov

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Introduction

Let us be clear at the outset what power the House of Representatives asserts: the House claims that it is entitled to keep alive a *criminal prosecution* that the Executive Branch no longer wishes to pursue on appeal. Never before has either House of Congress attempted, or any court authorized, such an exercise of core executive power. Article II vests executive power in the President, U.S. Const. Art. II, § 1, cl. 1, and requires that he "take Care that the Laws be faithfully executed," *id.* § 3. Under our separation of powers, Congress—let alone a single House—cannot intervene and assume control of litigation, simply because it disagrees with the manner in which the Executive has chosen to execute the laws.

Here, the Department of Justice initially pursued a prosecution of eight defendants involved in female genital mutilation, because it views that practice as heinous and reprehensible. The district court, however, dismissed the female-genital-mutilation charges as unconstitutional on the ground that the relevant statute, 18 U.S.C. § 116(a)—which was passed in 1996, before the Supreme Court's decision in *United States v. Morrison*, 529 U.S. 598 (2000)—lacks any jurisdictional hook to interstate commerce. On further examination, the Department reluctantly agreed with that determination, provided notice to Congress under 28 U.S.C. § 530D that it would not challenge the district court's ruling, and proposed a statutory amendment that the Department urged Congress to enact. That is precisely how the Branches should interact in a system that separates legislative from executive power.

At that point, the House (and Senate) were free to make simple amendments to the statute that would cure the constitutional defect and permit future federal prosecution of those who commit female genital mutilation. Given the broad condemnation of this abhorrent practice, it is inexplicable that the House has not acted on the Department's proposal. Instead, the House has chosen to try the one thing it plainly may *not* do: step into the shoes of the Executive, assume control of this criminal prosecution, and litigate on behalf of the United States. The Constitution entrusts that responsibility to the Executive alone. If the defendants in this case are to go to prison, it should not be at the behest of three members of the House's Bipartisan Legal Advisory Group.[1] This Court should therefore deny the House's motion for intervention, which would end this appeal and would leave the question where the Constitution places it: whether the House wishes to exercise its legislative power and amend this statute.

STATEMENT

This case involves the first federal prosecution under 18 U.S.C. § 116(a), which was enacted in 1996. That statute prohibits female genital mutilation by making it a federal criminal offense to "knowingly circumcise[], excise[], or infibulate[] the whole

[1] The Bipartisan Legal Advisory Group consists of five members: the Speaker of the House, the Majority and Minority Leaders, and the Majority and Minority Whips. Dkt. No. 24, at 1 n.1. Here, the Speaker, Majority Leader, and Majority Whip voted in favor of seeking intervention; the Majority Leader and Minority Whip voted against it. *Id.*

or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years." *Id.* The United States obtained an indictment charging eight defendants with, *inter alia*, violating Section 116(a) for their roles in performing the procedure on nine victims. *See* D. Ct. Op. 1-2 (PageID 3077-3078).

The district court dismissed the Section 116(a) charges on constitutional grounds. D. Ct. Op. 3, 28 (3079, 3104). First, the court determined that Section 116(a) is not necessary and proper to effectuate an international treaty under *Missouri v. Holland*, 252 U.S. 416 (1920), because the United States's obligations under the International Covenant on Civil and Political Rights do not address female genital mutilation, and because reliance on any such obligations would present serious federalism concerns. D. Ct. Op. 4-10 (3080-3086). Second, the court determined that Section 116(a) does not permissibly regulate interstate commerce because female genital mutilation is a form of physical assault rather than an economic activity and Section 116(a) does not include any jurisdictional element requiring a connection with or effect on interstate commerce. *Id.* at 10-26 (3086-3102) (relying, *inter alia*, on *United States v. Lopez*, 514 U.S. 549 (1995), and *Morrison*). The United States noticed an appeal. Dkt. No. 1.[2]

[2] The United States has a right to appeal from the pretrial dismissal of criminal charges. 18 U.S.C. § 3731. The Department has designated the Solicitor General as the official responsible for approving all such appeals. *See* 28 C.F.R. § 0.20(b); *Justice Manual* 2-2.121 (2018). Where the Solicitor General does not have the opportunity to make his decision within the time for filing a notice of appeal, *see* Fed. R. App. P. 4,

After reviewing the district court's decision, the Solicitor General determined that the Department of Justice lacks a reasonable defense of Section 116(a)'s constitutionality. Consistent with 28 U.S.C. § 530D, the Solicitor General informed Congress of that determination. Letter from N. Francisco, Solicitor General, to N. Pelosi, Speaker, U.S. House of Representatives (Apr. 10, 2019). The Solicitor General's letter condemned female genital mutilation as "an especially heinous practice" that has a "lifelong impact on victims." *Id.* at 1-2. Emphasizing the "importance of a federal prohibition on [female genital mutilation] committed on minors," the letter "urge[d] Congress to amend Section 116(a) to address the constitutional issue that formed the basis of the district court's opinion in this case." *Id.* at 2. To facilitate that action, the Department simultaneously submitted a specific legislative proposal that would amend Section 116(a) to "ensure that, in every prosecution under the statute, there is a nexus to interstate commerce," and it "urge[d] that Congress act forthwith" on the proposal. *Id.* at 2-3.

After the Department submitted that letter, but before it took steps to dismiss this appeal, the U.S. House of Representatives—through a divided vote of its Bipartisan Legal Advisory Group—filed a motion to intervene and to defend the constitutionality of Section 116(a) in this criminal prosecution. Dkt. No. 24 ("Mot.").

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the trial attorney responsible for the case must file a "protective" notice of appeal to preserve the government's rights. *See Justice Manual* 2-2.132. If the Solicitor General subsequently decides not to approve an appeal, the Department's practice is to file a motion under Fed. R. App. P. 42(b) to dismiss the appeal.

Contemporaneous with this opposition, the Department has now filed an unopposed motion to voluntarily dismiss its appeal.

ARGUMENT

The Constitution vests the prosecutorial power of the United States in the Executive Branch. *See* U.S. Const. art. II, §§ 1, 3. Accordingly, the "Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). The House's intervention motion attempts to carve out a role for the Legislative Branch from that constitutionally guarded prosecutorial power. No court has ever permitted the Legislative Branch to do what the House requests here—extend a federal criminal prosecution that the United States has determined no longer to pursue on appeal—and its request is unsound. No law does or could authorize it, and the House could not satisfy either the injury-in-fact requirement for Article III standing to pursue this appeal or even an intervention standard analogous to Federal Rule of Civil Procedure 24.

The proper role of the House in ensuring the viability of future prosecutions for female genital mutilation is its participation in the bicameralism and presentment process for enacting new laws. The Department has proposed legislation that would amend Section 116(a) to require proof of a nexus to interstate commerce, thereby eliminating the constitutional concerns that the district court identified. Congress

should expeditiously adopt that proposal. But the House cannot instead take the reins of a criminal prosecution.

I. No law or rule authorizes the House to intervene to continue this federal criminal prosecution.

The House acknowledges that, because this case involves a federal criminal prosecution, it "is highly unusual" even among the rare cases addressing legislative intervention. Mot. 5. Indeed, the United States is not aware of any court that has ever permitted *anyone* to intervene to defend the constitutionality of a federal criminal statute. *Cf. Sanger v. Reno*, 966 F. Supp. 151, 166 (E.D.N.Y. 1997) (declining to add House Members as defendants in suit challenging constitutionality of criminal prohibition, in part because criminal prosecutions are "entirely in the hands of the executive branch"). No law or rule expressly allows intervention in criminal cases, and courts have permitted intervention only to protect third-party interests distinct from the prosecution itself. Any such extratextual intervention authority cannot encompass the House's efforts to continue this criminal prosecution.

A. Only the Executive Branch may pursue an appeal of the dismissal of criminal charges.

Although styled as a motion to intervene, the House's motion in effect seeks to substitute the House as the appellant, challenging an order dismissing criminal charges that the United States has determined not to appeal. But it is a "well settled" rule "that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). "A 'party'

to litigation is 'one by or against whom a lawsuit is brought.'" *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009) (quoting Black's Law Dictionary 1154 (8th ed. 2004)); *see also* Restatement (Second) of Judgments § 34(1) (1982) (defining "party" as a person or entity "named as a party to an action and subjected to the jurisdiction of the court"). The only parties to a federal criminal prosecution are the defendant (the person "against whom" charges are brought) and the United States (the entity bringing the charges). *Eisenstein*, 556 U.S. at 933. And only "the United States" may appeal an order dismissing charges in a federal indictment. 18 U.S.C. § 3731.

The House does not contend, nor could it, that it represents the United States in this case. The Constitution vests the prosecutorial power in the Executive Branch, not the Legislative Branch. *See* U.S. Const. art. II, § 3 (duty to "take Care that the Laws be faithfully executed"); *United States v. Armstrong*, 517 U.S. 456, 467 (1996) (calling the "power to prosecute" "one of the core powers of the Executive Branch"). Just as no history exists of "any private prosecution of federal crimes" in the United States, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 816 n.2 (1987) (Scalia, J., concurring in the judgment), no history exists of any congressional prosecution of federal crimes. To the contrary, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *Nixon*, 418 U.S. at 693. Allowing a legislative entity to do so would permit the "legislative usurpation[]" of executive power, which in the Framers' view, "the people ought to

indulge all their jealousy and exhaust all their precautions" to prevent. *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 273 (1991) (quoting The Federalist No. 48, at 333 (Madison) (J. Cooke ed. 1961)). The House therefore lacks any authority to maintain this appeal on either the United States's behalf or its own.

B. The Federal Rules of Criminal Procedure do not authorize intervention.

Consistent with those separation-of-powers principles, the Federal Rules of Criminal Procedure do not provide any mechanism whereby the House may "properly become [a] part[y]" through intervention in a criminal case. *Marino*, 484 U.S. at 304. The House relies (Mot. 9-14) on an analogy to Federal Rule of Civil Procedure 24. Like all civil rules, however, Civil Rule 24 applies only in "civil actions and proceedings in the United States district courts," Fed. R. Civ. P. 1, and "does not apply in a *criminal* case," *United States v. Kollintzas*, 501 F.3d 796, 800 (7th Cir. 2007). And the Federal Rules of Criminal Procedure themselves contain no analogous intervention provision. Thus, a nonparty "has no right under the Federal Rules of Criminal Procedure to intervene" in a criminal case. *United States v. Briggs*, 514 F.2d 794, 804 (5th Cir. 1975).

The lack of a mechanism for intervention in a criminal case is not an oversight, but instead reflects the "important distinction between civil and criminal cases." *United States v. Hunter*, 548 F.3d 1308, 1312 (10th Cir. 2008). Although civil cases

often implicate the private, pecuniary interests of third parties, criminal prosecutions seek to vindicate the public interest, as represented by the Executive Branch, in the enforcement of the criminal laws against defendants alleged to have violated them. Accordingly, the courts of appeals have recognized that even the victims of a crime cannot intervene in its prosecution. *See, e.g.*, *United States v. Stoerr*, 695 F.3d 271, 276 (3d Cir. 2012); *Brandt v. Gooding*, 636 F.3d 124, 136 (4th Cir. 2011); *United States v. Aguirre-Gonzalez*, 597 F.3d 46, 53 (1st Cir. 2010).

The House notes (Mot. 9-10) that—despite the absence of a rule authorizing it—federal courts have occasionally allowed certain nonparties to intervene in a criminal case. But those courts have done so only for the limited purpose of allowing third parties to assert a personal interest unrelated to the merits of the underlying prosecution. That scenario typically arises when media organizations seek to intervene in a criminal case to challenge an order implicating First Amendment rights, *e.g.*, *United States v. Aref*, 533 F.3d 72, 81 (2d Cir. 2008), or when a recipient of a third-party subpoena seeks to challenge that subpoena, *e.g.*, *United States v. Cuthbertson*, 651 F.2d 189, 193-194 (3d Cir. 1981).[3] As the House recognizes (Mot. 9-10), in those

[3] In one additional (and unusual) case, a State intervened in defense of the constitutionality of a *state* statute that formed the basis of a federal prosecution under the Lacey Act, 16 U.S.C. § 3372(a)(2)(A). *See Maine v. Taylor*, 477 U.S. 131, 136 (1986). But the basis for the State's intervention was not a "legally cognizable interest in the prosecutorial decisions of the Federal Government" or the enforceability of a federal law, but instead its distinct and "legitimate interest" as a separate sovereign "in the continued enforceability of its *own* statutes." *Id.* at 137 (emphasis added); *see* 28 U.S.C.

limited circumstances, "a third party's constitutional or other federal rights are implicated by the resolution of a particular motion, request, or other issue during the course of a criminal case." *United States v. Carmichael*, 342 F. Supp. 2d 1070, 1072 (M.D. Ala. 2004). That is not true here. The House does not wish to assert a personal constitutional or other federal right that is *ancillary* to a criminal prosecution. Rather, it seeks to assume responsibility for *the prosecution itself* by challenging the dismissal of criminal charges. The House cites no decision of any court that has permitted intervention in a criminal case in circumstances similar to those here.

C. The reporting requirement in 28 U.S.C. § 530D does not authorize intervention.

The House errs in asserting (Mot. 6-8) that a statutory provision, 28 U.S.C. § 530D, grants it an unqualified right to intervene in these proceedings. Setting aside the fact that Congress cannot legislatively bootstrap such intervention here, Section 530D does not grant any right to intervene, much less an unconditional one. That statute, entitled "Report on enforcement of laws," provides in relevant part that "[t]he Attorney General shall submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice" determines to "refrain (on the grounds that the provision is unconstitutional) from defending … any Federal statute." *Id.* § 530D(a)(1)(B)(ii). Section 530D also includes a "[d]eadline," requiring

§ 2403(b) (authorizing States to intervene to defend the constitutionality of state statutes).

that the report be sent "within such time as will reasonably enable the House of Representatives and the Senate to take action, separately or jointly, to intervene in timely fashion in the proceeding, but in no event later than 30 days after the making of each determination." *Id.* § 530D(b)(2).

A deadline for a reporting requirement is not equivalent to a right or basis to intervene in judicial proceedings. The House attempts (Mot. 5) to "analog[ize]" to 28 U.S.C. § 2403(a), which states that a court "shall permit" the United States, through the Attorney General, "to intervene" to defend the constitutionality of a federal statute. But unlike Section 2403(a), which expressly authorizes intervention, Section 530D merely directs the Executive Branch to provide information to the Legislative Branch.[4] The statute goes no further. Although it contemplates that a legislative chamber may respond to a report by trying "to take action … to intervene," it does not establish any entitlement or basis to intervene, especially when the House or Senate cannot satisfy any intervention standards that might apply. Instead, Section 530D merely ensures that the House and Senate are not precluded, because of lack of timely notice of the litigation, from any intervention that they might assert was permissible.

Accordingly, when the House recently raised this same Section 530D argument in an appeal pending before the Fifth Circuit, it was rejected. *See* Order, *Texas v.*

[4] The House does not dispute that the United States timely complied with that reporting requirement. *See* Mot. 4.

United States, No. 19-10011 (5th Cir. Feb. 14, 2019) (Southwick, J.) (determining that "[t]he House has no right to intervene under … 28 U.S.C. § 530D," though granting permissive intervention in a civil case in which the existing parties, including the United States, were already proceeding with their appeals). This Court should likewise reject the argument that Section 530D's reporting requirement implicitly creates a statutory right that would—especially in the criminal context—have serious separation-of-powers consequences.

II. The House would have no right to intervene even under the standards applicable to intervention in a civil case.

Even if this Court were to analyze the House's motion under a standard analogous to Federal Rule of Civil Procedure 24, intervention would be improper. As a threshold matter, the House's efforts to seek appellate review on its own would require it to show Article III standing, which it cannot do. And beyond that, the House could not satisfy Civil Rule 24's standards for intervention as of right or permissive intervention.

A. Any intervention in this case would require Article III standing to appeal.

The House primarily relies (Mot. 10-14) on Civil Rule 24(a)(2), which requires a court to permit intervention by someone who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed.

R. Civ. P. 24(a)(2). But assuming that standard were applicable, it would not be the only bar that the House would have to clear.

Because the United States has elected not to appeal the district court's adverse decision, any "right to continue a suit in [its] absence … is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986); *see Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (explaining that an intervenor "must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing"). Although this Court has applied a somewhat lower standard for identifying an interest sufficient for civil intervention where a would-be intervenor appears alongside an original party, *see Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994), the House would face the higher Article III standard here, where it acts alone, *see Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 428 (6th Cir. 2008).

It would therefore be insufficient for intervention as of right for the House simply to show an "interest" that the disposition of this case could "impair or impede." Fed. R. Civ. P. 24(a)(2). Instead, the House would have to demonstrate that, under the injury-in-fact component of Article III standing, it has suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted).

B. The House has no legally or judicially cognizable interest in appealing the dismissal of this prosecution.

The House lacks a cognizable injury that could satisfy either the injury-in-fact requirement of Article III or the requirements of Civil Rule 24(a)(2).

1. The House claims "an interest in defending the constitutionality of legislation which it passed." Mot. 11 (internal quotation marks omitted). But the Constitution assigns to the Executive Branch rather than the Legislative Branch the authority to represent all of the sovereign interests of the United States in court. The Vesting Clause provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1. And the Take Care Clause "entrusts" to the President the "discretionary power to seek judicial relief." *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam); *see* U.S. Const. art. II, § 3 (the President "shall take Care that the Laws be faithfully executed"). As the Supreme Court has explained, "litigation conducted in the courts of the United States[,] … 'so far as the interests of the United States are concerned, [is] subject to the direction, and within the control of, the Attorney-General.'" *Buckley*, 424 U.S. at 139 (quoting *Confiscation Cases*, 74 U.S. 454, 458-459 (1869)). That authority includes a determination whether to appeal a judicial decision precluding enforcement of a federal criminal statute on constitutional grounds, no less than a determination whether to bring a federal criminal prosecution in the first instance.

By contrast, the Constitution grants to the Legislative Branch—of which the House is itself just one component—only specifically enumerated "legislative Powers." U.S. Const. art. I, § 1. "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement." *Buckley*, 424 U.S. at 139 (internal quotation marks omitted). "[I]t is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Id.* at 138 (quoting U.S. Const. art. II, § 3). "[O]nce Congress makes its choice in enacting legislation, its participation ends." *Bowsher v. Synar*, 478 U.S. 714, 733 (1986). Congress has no judicially cognizable interest in the "execution of the Act" it has enacted, which it may address only "indirectly," namely, "by passing new legislation." *Id.* at 734. And if that is true of Congress generally, it is doubly true for a single House of Congress, which has only "narrow" and "explicit" powers to act outside of the ordinary process of bicameralism and presentment. *INS v. Chadha*, 462 U.S. 919, 956 (1983).

2. The House proposes (Mot. 6-8) an exception to those fundamental separation-of-powers principles in circumstances where the Executive Branch declines to defend the constitutionality of a statute, relying on *Chadha* and *United States v. Windsor*, 570 U.S. 744 (2013). That reliance is misplaced. In each case, a legislative entity was allowed to participate where the Executive Branch *itself* had sought further review of an adverse decision.

In *Chadha*, the Supreme Court recognized that a case or controversy existed, without regard to Congress's participation, because even though the Executive Branch agreed with Chadha that the law at issue was unconstitutional, the Executive Branch continued to enforce the law against him. 462 U.S. at 939-940. Although the Court stated that "Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional," the Court made that statement while discussing "prudential" concerns about adverse presentation. *Id.* at 940 (citing *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968); *United States v. Lovett*, 328 U.S. 303 (1946)). The United States is not "a defendant" here, *id.*, and if it were, adverse presentation could be provided—as in *Cheng Fan Kwok* and *Lovett*—through the amicus-type role that does not require standing to maintain an appeal, *see Windsor*, 570 U.S. at 760-761. Moreover, *Chadha* involved an unusual statute that purported to vest the House and the Senate with an institutional power to veto certain Executive action. 462 U.S. at 923. Thus, even if *Chadha* could be read to approve congressional intervention in such circumstances, it still would not apply in this criminal case. *See Newdow v. United States*, 313 F.3d 495, 498-499 (9th Cir. 2002), (denying the Senate's intervention motion because Congress does not "have a roving commission to enter every case involving the constitutionality of statutes it has enacted" and explaining that *Chadha* involved "the authority of Congress within our scheme of government").

In *Windsor*, as in *Chadha*, a lower court invalidated a federal statute; the Executive Branch declined to defend the statute, but sought appellate review because it continued to enforce it to deny relief to a private party; and a legislative entity (citing *Chadha*) argued that it had Article III standing to seek appellate review on its own. 570 U.S. at 758-762. The Supreme Court, however, relied on *Chadha* to ground its Article III jurisdiction on the Executive Branch's actions instead. *Id.* at 761-762; *see id.* at 760 ("[T]he words of *Chadha* make clear its holding that the refusal of the Executive to provide the relief sought suffices to preserve a justiciable dispute as required by Article III."). Moreover, while the majority opinion in *Windsor* declined to pass on whether the Legislative Branch had standing in its own right, a three-Justice dissent rejected that position. *See id.* at 783-785 (Scalia, J., dissenting). As Justice Scalia explained, to the extent legislative intervention was appropriate in *Chadha*, that was only because that case "concerned the validity of a mode of congressional action" and "the House and Senate were threatened with destruction of what they claimed to be one of their institutional powers." *Id.* at 783. But, as in *Windsor*, "[n]othing like that is present here," *id.*, as this case involves the constitutionality of a federal criminal statute without any effect on the House's institutional prerogatives.

3. Decisions by the courts of appeals likewise provide no precedent for the House's intervention motion here. The House cites (Mot. 8 & n.10) several civil cases in which a legislative group successfully intervened to defend a federal law's constitutionality. But, unlike in this case, the cited decisions do not involve

circumstances in which the legislative group was required to demonstrate Article III standing. Those decisions thus contain no suggestion that the Executive Branch opposed intervention (except in the recent Fifth Circuit decision mentioned above), presumably because intervention would not have changed the posture of the litigation. *See, e.g.*, *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1545-1546 (10th Cir. 1991) (intervening in district court, and appealing alongside Executive Branch); *In re Koerner*, 800 F.2d 1358, 1359-1360 (5th Cir. 1986) (intervening in challenger's appeal); *Ameron, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 875, 880 (3d Cir. 1986) (intervening in Executive Branch's appeal). Unopposed intervention decisions in civil cases offer little insight here, where the actual parties oppose intervention, neither of those parties seeks further review, and the House's intervention would be the sole basis for maintaining an appeal and for extending the prosecution of criminal charges.

The House also relies (Mot. 12-13) on three of this Court's decisions. It first asserts that in *Northeast Ohio Coalition for Homeless v. Blackwell*, 467 F.3d 999 (6th Cir. 2006)—another civil appeal—this Court acknowledged a state legislature's "interest in defending the validity of its own enactments." Mot. 12. But in *Blackwell*, the State itself, through its Attorney General, moved to intervene. *See* 467 F.3d at 1006-1007. And in any event, States, unconstrained by federal separation-of-powers principles, may authorize governmental officials of their choosing "to represent the State's interests" in federal court. *Karcher v. May*, 484 U.S. 72, 82 (1987). The other decisions cited by the House involved private groups' motions to intervene in support of

challenged state laws—again, both in civil appeals. *See Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323 (6th Cir. 2007); *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997). But in *Miller* (a "close case"), the intervenor was a regulated entity with a practical (albeit indirect) interest in the enforcement of the law against the entity challenging it. *See* 103 F.3d at 1246-1247. *Miller*'s rationale cannot apply in a criminal case, where "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). And in *Northland*, this Court *denied* intervention, finding that the would-be intervenor lacked a "substantial legal interest" in the "enforceability of the statute," even though it had been "involved in the process that resulted in the passage of the challenged legislation." 487 F.3d at 345-346; *see generally Hollingsworth v. Perry*, 570 U.S. 693, 705-707 (2013).

C. The House could not satisfy even the standard for permissive intervention.

The House's lack of Article III standing would preclude not only intervention as of right, but permissive intervention as well. *See Diamond*, 476 U.S. at 68. But even if the Court were to apply the permissive-intervention standard of Civil Rule 24(b), it likewise would not support the House's novel intervention request in this case.

Civil Rule 24(b) allows (but does not require) intervention for someone with "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). As an initial matter, the House does not have a common

"claim or defense" at all, because the House will not face any different legal or practical obligations as a result of this case's disposition. *See* Fed. R. Civ. P. 8(a), (b)(1)(A) (requiring pleadings to state a "claim for relief" or a "defense[] to [any] claim asserted against [the party]"); *see also* Fed. R. Civ. P. 24(c) (requiring intervenors to file pleadings). The "common question" requirement is not satisfied merely because a "party wish[es] to intervene to support one side of a lawsuit." *Bay Mills Indian Cmty. v. Snyder*, 720 F. App'x 754, 757 (6th Cir. 2018) (unpublished). And here, without the House's intervention, the "main action" would no longer exist; instead, the prosecution of these counts would be over.

Regardless, permissive intervention could "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Neither of the original parties—the defendants or the prosecution—seeks review of the district court's dismissal of the Section 116(a) charges. Thus, the effect of the House's intervention would be to delay the adjudication of the parties' rights in the uniquely time-sensitive criminal context. *Cf. United States v. Watford*, 468 F.3d 891, 901 (6th Cir. 2006) (summarizing constitutional constraints on delays in criminal proceedings).

CONCLUSION

The House of Representatives' intervention motion should be denied.

Respectfully submitted,

BRIAN A. BENCZKOWSKI
Assistant Attorney General

MATTHEW S. MINER
Deputy Assistant Attorney General

SONJA M. RALSTON
Attorney
Criminal Division, Appellate Section
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Suite 1264
Washington, DC 20530
(202) 532-6047
Sonja.Ralston@usdoj.gov

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), the undersigned counsel of record certifies that the foregoing Opposition was this day served upon counsel for all participants by notice of electronic filing with the Sixth Circuit CM/ECF system.

DATED: MAY 31, 2019

s/Sonja M. Ralston
Sonja M. Ralston
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Suite 1264
Washington, DC 20530
(202) 532-6047
sonja.ralston@usdoj.gov

CERTIFICATE OF COMPLIANCE

1. This Opposition complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) because it contains 5,197 words, excluding the parts exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Garamond 14-point font in text and Garamond 14-point font in footnotes.
3. This brief complies with the privacy redaction requirement of Fed. R. App. P 25(a) because it contains no personal data identifies.
4. The digital version electronically filed with the Court on this day is an exact copy of the written document to be sent to the Clerk; and
5. This brief has been scanned for viruses with the most recent version of McAfee Endpoint Security, version 10.5, which is continuously updated, and according to that program is free of viruses.

DATED: MAY 31, 2019

s/Sonja M. Ralston
Sonja M. Ralston
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Suite 1264
Washington, DC 20530
(202) 532-6047
sonja.ralston@usdoj.gov